IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 255 OF 2007

IN

ARBITRATION PETITION NO.327 OF 2006

Gammon India Limited
Gammon house,
Veer Savarkar Marg,
Prabhadevi, Mumbai – 400 025. ….. *Appellant*
(Original Respondent)

:Versus:

Konkan Railway Corporation Ltd.,
Belapur Bhavan, Plot No.6,
Sector 121, CPC Belapur,
Navi Mumbai – 400 0614. ….. *Respondent*
(Original Petitioner)

Mr. Amrut Joshi *with Mr. Yazad Udwadia and Mr. Aditya Mhatre i/b Mr. Akshay Zantye, for the Appellant.*

Mr. Tushad Kakalia *with Mr. D. J. Kakalia, Mr. Paresh Patkar and Mr. Ayan Zariwalla i/b Mulla & Mulla & Craigie Blunt & Caroe, for the Respondent.*

CORAM : ALOK ARADHE, CJ. &
SANDEEP V. MARNE, J.
RESERVED ON : 16 July 2025
PRONOUNCED ON : 22 July 2025

JUDGMENT (*Per Sandeep V. Marne, J.*):

1) This is an Appeal filed under the provisions of Section 37 of the Arbitration and Conciliation Act, 1996 **(the Act)** challenging the

order dated 16 November 2006 passed by the learned Single Judge of this Court in Arbitration Petition No.327/2006, in which Award passed by the Arbitral Tribunal was challenged under Section 34 of the Act. By the impugned order dated 16 November 2006, the learned Single Judge has allowed Arbitration Petition No.327/2006 and has set aside the Arbitral Award, by which three claims of the Appellant towards electricity charges, price variation on account of increase in minimum wages and extra cost of excavation were allowed by the Arbitral Tribunal.

2) Brief facts leading to filing of the present petition are that Konkan Railways Corporation Ltd. (**KRCL**) a public utility undertaking of the Government of India invited tenders for construction of B.G. Single Line Tunnel (Tunnel No.20 – Karbude Tunnel) in Ratnagiri (North). The Appellant was a successful bidder and was issued Letter of Acceptance dated 25 June 1991. Agreement dated 9 July 1991 was executed for construction of the tunnel walls. The work was completed after grant of several extensions. On 14 September 1998, Appellant submitted the final bill and on 22 May 2001, a further amended final bill was submitted. The Appellant invoked arbitration clause raising disputes for total 25 claims totaling to Rs.15,62,29,315/-. The Arbitral Tribunal was constituted on 16 May 2003. Appellant-Claimant filed Statement of Claim, which was resisted by Respondent by filing its Written Statement. After considering the documentary and oral evidence, the Tribunal made an Award on 14 January 2006 awarding sum of Rs.4,39,38,389/- in favour of the Appellant by fully accepting some of the claims, partly accepting some claims and rejecting some claims.

3) Respondent accepted the Arbitral Award in respect of Claim Nos.1, 2, 7, 10, 19, 21 and 22 and decided to challenge the Award only in respect of the Award of Claim Nos.5, 6 and 8. Accordingly, Respondent filed Arbitration Petition No. 327/2006 in this Court challenging the Award dated 14 January 2006 to the limited extent of award of Claim No.5 (*Refund of recoveries towards electricity charges),* Claim No.6 (*Reimbursement of difference between price variation on account of increase in minimum wages*) and Claim No.8 (*Extra cost in excavation of soft strata of Tunnel from Bhoke Portal side).* By the impugned order dated 16 November 2006, the learned Single Judge has allowed Arbitration Petition No. 327/2006 and has set aside the arbitral award only to the extent of Claim Nos. 5, 6 and 8. Aggrieved by the order dated 16 November 2006, the Appellant-Claimant has filed the present Appeal under the provisions of Section 37 of the Act.

4) Mr. Amrut Joshi, the learned counsel appearing for the Appellant would submit that the learned Single Judge has exceeded the jurisdiction under Section 34 of the Act while interfering with the Arbitral Award. That the decision of the Arbitral Tribunal was based on judicial approach and does not suffer from the vice of perversity or irrationality and in support, he would place reliance on judgment of the Apex Court in ***Associate Builders Versus. Delhi Development Authority***[1]**.** He would further submit that the scope of appeal under Section 37 of the Act, though limited, can be exercised if the Court exercising jurisdiction under Section 34 of the Act has travelled beyond its scope by adjudicating the dispute through reappreciation mechanism. That in the present case, the learned Single Judge has undertaken the

[1] (2015) 3 SCC 49

exercise of independent interpretation of terms of contract and re-appreciation of material on record for the purpose of arriving at conclusions different than the one arrived at by the Arbitral Tribunal. That since Section 34 Court has exceeded its power, interference by the Appeal Court in exercise of jurisdiction under Section 37 of the Act is clearly warranted.

5) That the learned Single Judge has acted as if it was the first Appellate Court over the Award. That interpretation and construction of a contract is solely within the domain of the Arbitral Tribunal and plausible view rendered by the Tribunal has to pass muster as the Arbitral Tribunal is the ultimate master of the quality and quantity of evidence to be relied upon.

6) So far as interference made by the learned Single Judge in Claim No.5 awarded by the Arbitral Tribunal is concerned, Mr. Joshi would submit that the Arbitral Tribunal has considered contemporaneous contracts between the Respondent and other contractors where there was a specific provision for recovery of electricity charges from the Contractor. That the learned Single Judge proceeded to set aside the Award relating to Claim No.5 only on account of letter dated 27 September 1992 addressed by the Appellant making grievance about recovery of increased rate of electricity charges. The said letter was not before the Arbitral Tribunal and therefore request was made by the Appellant to remand the matter back to the Arbitral Tribunal for consideration under Section 34(4) of the Act. That the learned Single Judge refused to accede to the said request by erroneously holding that no useful purpose would be served by doing so. The learned Single Judge erred in relying on the

said correspondence and rendering findings thereon as if it is a Court of first instance.

7) So far as Claim No.6 is concerned, Mr. Joshi would submit that the learned Single Judge has sat in appeal over the interpretation of contract clauses made by the Arbitral Tribunal. That the learned Single Judge took into consideration only the truncated Clause-28.1 of the contract by ignoring various clauses, which specifically provide for price variation on account of fluctuation in labour charges. That the order of the learned Single Judge thus suffers from the vice of perversity by failing to take into consideration clauses-28.3 to 28.7, as well as clauses-52.1, 52.2 and 53.1 of the contract.

8) In respect of Claim No.8, Mr. Joshi would submit that the learned Single Judge has embarked upon exercise of analysing and appreciating facts and evidence, which was solely within the domain of the Arbitral Tribunal. That the learned Single Judge failed to consider Addendum dated 3 May 2009 and subsequent correspondence exchanged between the parties and therefore the order suffers from the vice of perversity.

9) Mr. Joshi would submit that so long as the ultimate conclusion of the Arbitral Tribunal is acceptable in law, mere failure to record adequate or proper reasons cannot be a ground for setting aside the award. That in the present case, the claims awarded by the Arbitral Tribunal towards electricity charges, price variation due to increase in minimum wages and extra cost incurred in excavation of soft strata are possible/plausible conclusions and what is done by the learned Single Judge is to set aside the Award only because the

reasons recorded for allowing the claims are not found to be sufficient, adequate or proper. That such an exercise is impermissible and he would rely upon judgment of the Apex Court in ***OPG Power Generations Private Limited Versus. Enexio Power Cooling Solutions India Private Limited and another***[2]. He has also pressed into service the business efficacy test enunciated in ***Mumbai Metropolitan Region Development Authority Versus. Unity Infraproject Ltd.***[3] in support of the contention that interpretation of contractual terms must ultimately align with the business realities. He would submit that the interpretation done by the learned Arbitrator was in tune with the business realities and fully satisfied the business efficacy test and that it was impermissible for the learned Single Judge to interfere only on account of the fact that a different interpretation of contractual terms was also possible. He would also rely on judgment in ***Nabha Power Limited (NPL) Versus. Punjab State Power Corporation Limited (PSPCL) and another***[4]. On the above broad submissions, Mr. Joshi would pray for dismissal of the petition.

10) The Appeal is opposed by Mr. Kakalia, the learned counsel appearing for the Respondent. He would submit that the scope of jurisdiction by Appellate Court under Section 37 of the Act is restricted and subject to the same grounds of challenge under Section 34 of the Act. That the jurisdiction is even more circumscribed. That the learned Single Judge has recorded cogent reasons while setting aside Arbitral Award in respect of Claim Nos.5, 6 and 8. That the learned Judge has remained within the confines of Section 34 of the Act while passing the impugned order. That the learned Single Judge

[2] (2025) 2 SCC 417

[3] 2008 SCC OnLine Bom 190

[4] (2018) 11 SCC 508

has noticed the fact that the Arbitral Tribunal had excluded the relevant material while delivering the Award. That exclusion of relevant material for rendering the Award is a valid ground for setting aside the Award under Section 34 of the Act.

11) So far as Claim No.5 is concerned, Mr. Kakalia would submit that the Appellant had clearly admitted the liability to bear electricity charges vide letter dated 29 September 1992, in which grievance was sought to be raised to the limited extent of the rate at which the electricity charges were recovered. That the Arbitrator had erroneously excluded the letter dated 27 September 1992 which was the most vital material for deciding Claim No.5 and that the learned Single Judge has rightly set aside the Award pertaining to Claim No.5. Reliance in placed on judgment of the Apex Court in ***Ssangyong Engineering and Construction Company Limited Versus. National Highways Authority of India (NHAI)***[5]. That the learned Single Judge has rightly rejected the prayer of the Appellant for remand under the provisions of Section 34(4) of the Act by holding that no useful purpose would be served by making an order for remand as the material was available on record but still excluded from consideration. Reliance is placed on judgment of the Apex Court in ***I-Pay Clearing Services Private Limited Versus. ICICI Bank Limited***[6] wherein the Apex Court has held that Section 34(4) is not meant to be resorted to for the purpose of curing findings that are rendered while ignoring vital evidence or where the consideration of such evidence might alter the award.

5 (2019) 15 SCC 131
6 (2022) 3 SCC 121

12) So far as Claim No.6 is concerned, Mr. Kakalia would submit that KRCL has already paid price variation due to fluctuation of labour charges upto the contractual limit of 45%. That the claim of the Appellant was beyond 45%, where it claimed 75% escalation which was beyond the contractual terms. That the learned Single Judge has rightly considered the provisions of Clause-28.1 of the contract and therefore no interference is warranted in the order of the learned Single Judge.

13) So far as Claim No.8 is concerned, Mr. Kakalia would submit that the Appellant had submitted bid after carrying out due inspection of the site and the price was quoted after taking into consideration, all the relevant factors of excavation. That the learned Single Judge has rightly relied upon Clauses-3 and 4 of the Special Specifications for Tunneling, which was excluded by the learned Arbitrator. Mr. Kakalia would pray for dismissal of the Appeal.

14) Rival contentions of the parties now fall for our consideration.

15) The Appellant was awarded work of construction of Tunnel No.20, Karbude Tunnel in Ratnagiri (North) section by the KRCL vide Letter of Acceptance dated 25 June 1991 followed by an Agreement dated 9 July 1991. It was an Item-Rate contract with contract value of approximately Rs.16.39 crores initially. Several Supplementary Agreements were executed during the construction period and several extensions were also granted without any liquidated damages. The Appellant submitted final bill on 14 September 1998 for sum of Rs.15,31,55,253/- and submitted further

amendment to their final bill on 22 May 2001 for Rs.8,44,027/- for escalation payment. KRCL made certain payments. Appellant alleged short payments by KRCL and accordingly raised 25 claims before the Arbitral Tribunal. As observed above, most of the claims of the Appellant have been rejected by the Arbitral Tribunal. While some of the claims are partly accepted, some are fully accepted. The details of the 25 claims raised by the Appellant together with claim amounts and awarded amounts are as under :-

Claim No.	Claim Particulars	Claimed Amount	Awarded Amount
Claim 1	Additional cost for construction of approach roads including culverts enroute to work locations	Rs. 19,05,528/-	Rs. 9,41,715
Claim 2	Extra cost of providing diesel run equipments for executing contract work	Rs. 12,83,562/-	Rs. 11,42,000/-
Claim 3	Extra cost for dewatering done manually from the shafts	Rs. 3,19,067/-	NIL
Claim 4	Claim for extra rate for shat excavation	Rs. 11,52,726/-	NIL
Claim 5	**Refund of recoveries wrongly effected from RA Bills/ Escalation Bills towards electricity charges**	**Rs.1,31,58,563/-**	**Rs. 1,31,58,563/-**
Claim 6	**Claim for reimbursement of difference between Price Variation on account of increase in Minimum Wages**	**Rs. 79,43,068/-**	**Rs. 65,66,478/-**
Claim 7	Refund of undue Penalty from RA Bills	Rs. 12,02,880/-	Rs. 6,01,440/-
Claim 8	**Extra cost in excavation in soft strata of Tunnel from Bhoke Portal side**	**Rs.2,96,74,091/-**	**Rs. 56,83,000/-**
Claim 9	Reimbursement of Infrastructure Expenditure incurred due to shortfall in Excavation of Tunnel from Bhoke Portal soft strata	Rs. 76,36,912/-	NIL
Claim 10	Revision BOO rate item 1(i) for Tunneling with imported equipment	Rs.2,60,26,820/-	Rs. 1,51,31,000/-
Claim 11	Compensation on account of inadequate performance of imported equipments	Rs. 42,23,638/-	NIL
Claim 12	Compensation for delay in arranging imported equipments by KRCL	Rs. 38,18,500/-	NIL

Claim 13	Refund of undue and wrongful recoveries made towards cost of drill bits supplied by KRCL	Rs. 6,05,780/-	NIL
Claim 14	Refund of undue and wrongful recovery made towards hire charges of Electrical cable and transformer	Rs. 3,30,785/-	NIL
Claim 15	Interest charges on wrongful recoveries made from RA Bill payments	Rs.1,19,29,014/-	NIL
Claim 16	Compensation for reduction in scope of work	Rs.1,19,25,713/-	NIL
Claim 17	Reimbursement of infructuous losses suffered on account of withdrawal of portion of work	Rs. 61,38,235/-	NIL
Claim 18	Compensation towards extra cost incurred on extended period of contract	Rs.2,24,89,200/-	NIL
Claim 19	Payment towards cost of blower and aluminium cable taken by KRCL for its use	Rs. 2,30,000/-	Rs. 2,30,000/-
Claim 20	Refund of interest amount recovered beyond the amount envisaged at the time of Tender	Rs. 17,88,873/-	NIL
Claim 21	Refund of excess recovery made towards materials drawn for ancillary/extra works	Rs. 6,09,587/-	Rs. 1,71,456/-
Claim 22	Additional rate for variation in quantity of open excavation in soft and hard rock	Rs. 3,87,809/-	Rs. 3,87,809.06
Claim 23	Refund of undue and wrongful recovery made in final bill passed by Corporation on account of excess payment on price escalation	Rs. 3,21,309/-	NIL
Claim 24	Reimbursement of short payment of price escalation made in Final Bill	Rs. 1,78,638/-	NIL
Claim 25	Payment of escalation on works carried out under Supplementary Agreement No. 6 & 7 as submitted vide amendment to the Final Bill vide letter No. WSS/G/243 dated 22.05.2001	Rs. 8,44,027/-	NIL

16) As observed above, KRCL accepted the Award in respect of Claim Nos.1, 2, 7, 10, 19, 21 and 22 and filed Arbitration Petition No. 327/2006 only to the extent of Claim Nos. 5, 6 and 8. Therefore, the limited issue before the learned Single Judge was about correctness of the Award made by the Arbitral Tribunal *qua* Claim Nos.5, 6 and 8.

17) Before proceeding to examine the correctness of the impugned order passed by the learned Single Judge, some discussion on the scope of jurisdiction of Court under Section 34 of the Act and of the Appeal Court under Section 37 of the Act would be necessary. The Award was made and the order has been passed by the learned Single Judge before amendment to the Arbitration Act of 2015. Prior to the 2015 amendments to the Act, the Award could be set aside if the same was in conflict with public policy of India.

18) The judgment of the Apex Court in ***Associate Builders*** (supra) deals with the contours of jurisdiction of Court exercising power under Section 34 of the Act, as it stood prior to the 2015 amendment. The Apex Court, after referring to its previous judgments, has restated the law on interpretation of the expression '*fundamental policy of Indian law*'. It is held that the binding effect of the judgment of a superior court being disregarded would be violative of the fundamental policy of Indian law (see ***ONGC Vs. Saw Pipes***[7]). The Court noted addition of three more fundamental juristic principles of (i) judicial approach (ii) *audi alterm partem* and (iii) perversity or irrationality (See ***ONGC Ltd. v. Western Geco International Ltd.***[8]). On the first principle the Apex Court observed that juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective. On the third juristic principle, the Court held that a decision would be perverse or irrational where no reasonable person would have arrived at the same. It is held that where (i) a finding is based on no evidence,

7 (2003) 5 SCC 705
8 (2014) 9 SCC 263

or (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. The Court further held that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. The Apex Court has also dealt with the ground of patent illegality and held *inter alia* that contravention of the substantive law of India would result in the death knell of an arbitral award, but such illegality must go to the root of the matter and cannot be of a trivial nature.

19) So far as scope of interference by the Appeal Court under Section 37 of the Act is concerned, the Appeal Court cannot travel beyond the restrictions stipulated under Section 34 of the Act by making independent assessment of merits of the Award. In ***Bombay Slum Redevelopment Corporation Private Limited Versus. Samir Narain Bhojwani***[9], the Apex Court has discussed the scope of Appeal under Section 37 of the Act by referring to the decision in ***UHL Power Company Limited Versus. State of Himachal Pradesh***[10] and has held in paras-23 to 28 as under:

> **23.** We need not dwell on the limited scope of interference in the petition under Section 34 of the Arbitration Act. That position is very well settled. However, as far as the appeal under Section 37(1)(*c*) of the Arbitration Act is concerned, in *MMTC Ltd.* v. *Vedanta Ltd.* [*MMTC Ltd.* v. *Vedanta Ltd.*, (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , in para 14, this Court held thus : (SCC p. 167)
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> > "*14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under*

[9] (2024) 7 SCC 218

[10] (2022) 4 SCC 116

Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

(emphasis supplied)

24. In another decision of this Court in *UHL Power Co. Ltd.* v. *State of H.P.* [*UHL Power Co. Ltd.* v. *State of H.P.*, (2022) 4 SCC 116 : (2022) 2 SCC (Civ) 401] , in para 16, it was held thus : (SCC pp. 124-25)

"*16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd.*, (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

'11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(*b*)(*ii*) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses* v. *Wednesbury Corpn.,* (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.' "

(emphasis supplied)

25. In the decision of this Court in *Konkan Railway Corpn. Ltd.* v. *Chenab Bridge Project* [*Konkan Railway Corpn. Ltd.* v. *Chenab Bridge Project,* (2023) 9 SCC 85 : (2023) 4 SCC (Civ) 458] , in para 18, it was held thus : (SCC p. 93)

"*18. At the outset, we may state that the jurisdiction of the court under Section 37 of the Act, as clarified by this Court inMMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 :*

> *(2019) 2 SCC (Civ) 293] , is akin to the jurisdiction of the court under Section 34 of the Act.* ['*14.* As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision.'] *Id*, SCC p. 167, para 14. *Scope of interference by a court in an appeal under Section 37 of the Act, in examining an order, setting aside or refusing to set aside an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act."*
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> *(emphasis supplied)*

26. The jurisdiction of the appellate court dealing with an appeal under Section 37 against the judgment in a petition under Section 34 is more constrained than the jurisdiction of the Court dealing with a petition under Section 34. It is the duty of the appellate court to consider whether Section 34 Court has remained confined to the grounds of challenge that are available in a petition under Section 34. The ultimate function of the appellate court under Section 37 is to decide whether the jurisdiction under Section 34 has been exercised rightly or wrongly. While doing so, the appellate court can exercise the same power and jurisdiction that Section 34 Court possesses with the same constraints.

27. In the facts of the case in hand, while deciding the petition under Section 34 of the Arbitration Act, the learned Single Judge has made a very elaborate consideration of the submissions made across the Bar, the findings recorded by the Arbitral Tribunal and the issue of illegality or perversity of the award. Detailed reasons while dealing with the alleged patent illegalities associated with the directions issued under the arbitral award have been recorded. Considering the nature of the findings recorded by the learned Single Judge, the job of the appellate court was to scrutinise the said findings and to decide, one way or the other, on merits. In this case, the finding of the Appellate Bench [*Samir Narain Bhojwani* v. *Bombay Slum Redevelopment Corpn. Ltd.,* 2023 SCC OnLine Bom 2957] that the impugned judgment [*Bombay Slum Redevelopment Corpn. Ltd.* v. *Samir Narain Bhojwani,* 2019 SCC OnLine Bom 1853] of the learned Single Judge does not address several issues raised by the parties cannot be sustained at all.

28. The provisions of the CPC have not been made applicable to the proceedings before the learned arbitrator and the Court under Sections 34 and 37 of the Arbitration Act. The legislature's intention is reflected in Section 19(1) of the Arbitration Act, which provides that an Arbitral Tribunal is not bound by the provision of the CPC. That is why the provisions of the CPC have not been made applicable to the proceedings under Sections 34 and 37(1)(*c*). We are not even suggesting that because the provisions of the CPC are not applicable, the appellate court dealing with an appeal under Section 37(1)(*c*) is powerless to pass an order of

> remand. The remedy of an appeal will not be effective unless there is a power of remand vesting in the appellate authority. In the Arbitration Act, there is no statutory embargo on the power of the appellate court under Section 37(1)(*c*) to pass an order of remand. However, looking at the scheme of the Arbitration Act, the appellate court can exercise the power of remand only when exceptional circumstances make an order of remand unavoidable.

20) Having considered the board contours of jurisdiction of the Court exercising power under Section 34 and by Appeal Court under Section 37 of the Act, we now proceed to examine whether the learned Single Judge has exceeded the jurisdiction under Section 34 of the Act while passing the impugned order.

Claim No.5 - Refund of Recoveries wrongfully effected from RA Bills/Escalation Bills towards electricity charges

21) The Arbitral Tribunal awarded the entire Claim No.5 for Rs.1,31,58,563/-. The said claim was raised by the Appellant claiming that it was not liable to pay electricity consumption charges and questioned the action of KRCL in deducing the electricity consumption charges and accordingly raised a claim for refund. The learned Arbitrator observed that the terms and conditions of the contract did not specifically mention that the electricity consumption charges were to be borne by the Appellant. The learned Single Judge took note of Clauses-10.2 and 10.5 of the Contract which provided that '*all charges*' connected with tapping/developing and maintaining the site facilities were to be initially borne by the Claimant within his quoted rate structure. Most importantly, the learned Single Judge took note of letter dated 24 August 1992 sent by the Deputy Chief Engineer of KRCL informing the Appellant about liability to pay all charges for electricity power connection. Appellant sent the response

to the said letter on 8 September 1992 and the learned Single Judge has quoted three paras of the said letter which read thus :-

> " In this connection we would like to bring to you kind notice that at no place our tender specify recovery towards demand charges, P.F.Penalty charges etc. and hence we have not considered these while quoting for the above job.
>
> I would be pertinent to you would appreciate if we add here that it is brought to our notice that condition regarding recovery towards P.F.penalty etc. is included in some of the contracts awarded to other agencies working for Konkan Railway Project.
>
> In the light of the above we request your goodself to reconsider your decision and refund all the excess amount recovered from our R.A.Bills towards electricity."

22) The learned Arbitrator took into consideration one more letter dated 27 September 1992 in paras-1 and 2 wherein the Appellant has stated as under :-

> It may kindly be noted that we have not provided in our contracted rates such sudden and steep raise in electricity charges and hence, we are constrained to add here that we do not accept the above recovery and we request you to kindly refund the excess recovery made on this account.
>
> In view of the temporary suspension of the work, we request that no recovery towards electricity be done at these places till normal working activity is resumed.

23) After taking into consideration the above correspondence, it is crystal clear that the Appellant never denied the liability to pay electricity consumption charges. The tenor of letter dated 27 September 1992 indicates willingness to bear electricity consumption charges, but complaint was raised only in respect of steep rise in the rate at which the charges were demanded by KRCL. Thus, Appellant had never disputed the liability to bear electricity charges in respect of the site. The learned Single Judge has considered the position that the Arbitral Tribunal had excluded this vital

material while delivering the Award. In our view, therefore the learned Judge has therefore rightly set aside the Award *qua* Respondent No.5.

24) Coming to the aspect of remand of proceedings under sub-section (4) of Section 34 of the Act, it is contended by Mr. Joshi that if indeed the correspondence was excluded by the Arbitral Tribunal, the correct course of action was to invite findings of the Tribunal on such correspondence under the provisions of Section 34(4) of the Act. It is contended that the learned Single Judge would not have directly appreciated the said correspondence as if it is a Court of first instance and recorded his findings on the said correspondence. Sub-section (4) of Section 34 of the Act provides thus :-

> (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

25) The learned Single Judge has not accepted the request made by the Appellant for remand of proceedings under Section 34(4) of the Act by recording the following findings :-

> At this stage it may be pointed out that the learned Counsel appearing for respondent had submitted that order under sub section (4) of section 34 of the Arbitration Act can be made so that material which is not considered by the learned Arbitrator could be considered by the learned Arbitrator. In my opinion, no useful purpose would be served by making order under sub section (4) of Section 34 of the Act in this matter, firstly because the material was available on record

> and the material which has been excluded from consideration is so obvious that the claim cannot be sustained and has to be rejected. Therefore, in my opinion, there is no useful purpose will be served by making order under sub section (4) of Section 34 of the Act.

26) We are in agreement with the above findings recorded by the learned Single Judge. If the material was already available on record, but was erroneously excluded by the learned Arbitrator, the Court exercising power under Section 34 of the Act is justified in setting aside the Award. We are also in agreement with the findings recorded by the learned Single Judge that no useful purpose would be served by inviting the findings of the learned Arbitrator on the above correspondence. Once, there is a clear admission on the part of the Appellant to bear liability of electricity charges through the correspondence, it was not necessary for the learned Single Judge to invite findings of the Arbitral Tribunal which had committed a manifest error in ignoring such vital material while making the Award. The correspondence speaks for itself, and it was not necessary to invite findings of the Arbitral Tribunal for the purpose of sitting in Appeal over such findings of Section 34 Court.

27) Here, reliance by Mr. Kakalia on judgment of the Apex Court in ***I-Pay Clearing Services Pvt. Ltd*** *(supra)* is apposite wherein it is held that power of remand under Section 34(4) of the Act is discretional and it is not always obligatory on the part of the Court to remand the matter to Arbitral Tribunal. Remand cannot be made for the purpose of enabling the Arbitral Tribunal to record findings on the issue where they are no findings at all. It is held that if findings of the arbitral tribunal are recorded ignoring the material evidence on record, the same is an accepted ground for setting aside the Award

itself and an opportunity cannot be granted to consider such ignored material and record fresh reasons. It is held in paras-39 to 42 as under:-

> **39.** Further, Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words "where it is appropriate" itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act and the reply thereto.
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> **40.** Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award.
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> **41.** Under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the arbitrator, where there are no findings on the contentious issues in the award. **If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under the guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the arbitrator.** In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award.
>
> **42.** A harmonious reading of Sections 31, 34(1), 34(2-A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. **But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings.**
>
> *(emphasis added)*

28) In the present case, the claim has been sanctioned by the arbitral tribunal by ignoring the vital material in the form of admission of liability by the Appellant to bear electricity charges. On the contrary irrelevant material of contractual clauses of other contracts are taken into consideration by the tribunal. In such circumstances, since the award suffered from the vice of perversity, there was no warrant for resumption of arbitral proceedings under Section 34(4) of the Act. We are therefore unable to accept the contention raised on behalf of the Appellant that an order of remand under Section 34(4) of the Act ought to have been made by the learned Single Judge *qua* claim No. 5.

Claim No.6 : Claim for reimbursement of difference between price variation on account of increase in minimum wages.

29) Out of the claim of Rs.79,43,068/-, the Arbitral Tribunal awarded sum of Rs.65,66,478/-, this claim was towards difference in wages of labour on account of increase in the minimum wages. It must be clarified at once that KRCL has already been paid the differential amount on account of price variation to the extent of 45% as agreed in Clause-28.4 of the Contract. The demand of Appellant was towards the price variation in excess of 45% for '*Component of Labour*' which was clearly impermissible as per the contractual conditions. The price variation was admissible only as per Clauses-28.1 to 28.10. We are not impressed by the submission made on behalf of the Appellant that the learned Single Judge has only considered Clause-28.1 of the Contract and has ignored Clauses-28.2 to 28.10. In fact, if Clause-28.4 is taken into consideration, a clear cap of 45% was stipulated for award of price variation on labour component. We

therefore do not find any manifest error on the part of the learned Single Judge in setting aside the Award *qua* Claim No.6.

Claim No.8– Extra Cost in excavation in soft strata of Tunnel from Bhoke Portal side

30) Out of the claim of Rs.2,96,74,091/-, a sum of Rs.56,83,000/- was awarded by the Arbitral Tribunal. The claim of the Appellant was towards extra cost allegedly incurred by it for excavation in soft strata of Tunnel from Bhoke Portal side. The case of the Appellant was that while excavating the tunnel, it came across soft strata contrary to the Geo-technical appraisal given in the bid document indicating that the excavation was likely to go across amygdule basalt. According to the Appellant, the strata encountered was not rock/dense basalt, but laterite and soft material throughout in 400 mtrs from Bhoke side. This forced the Appellant to resort to drift method of tunneling with heavy seepage issues not permitting proper drilling cycle and meeting of unexpected expenditure.

31) The learned Arbitrator held that there was a significant change in the geographical structure from reasonably hard rock to laterite and soft material forcing the Appellant to change the tunneling methodology thereby escalating the overall cost two to three times as compared to hard strata in similar working conditions. The learned Single Judge noted that no reasons are recorded by the Arbitral Tribunal for awarding Claim No.8. The learned Single also took note of Clauses-3 and 4 '*Special Condition for Tunneling*' which stipulated that no extra payment would be made for variation in rocks/soil. The learned Single Judge noted that the Arbitral Tribunal had not considered Clauses-3 and 4 of Special Specifications for

Tunneling. It is further held that the accepted rates for tunneling excavation were to be held good for all excavation irrespective of type of rock or salt encountered in the tunnel. In our view, the award of Claim No.8 by the learned Arbitrator was by excluding the vital material in the form of Clauses-(3) and (4) of the Special Specifications for Tunneling and the learned Single Judge has rightly set aside the Award *qua* Claim No.8 as well.

32) Here we also note fair submission by Mr. Joshi who has invited our attention to a following declaration made by the Appellant:-

> I/We herby declare and certify that I/We have inspected/investigated the site(s) of work and have fully familiarised myself/ourselves with all aspects of constructional features such as accessability, working conditions, geo-physical/terrain conditions etc., whereupon only rates have been quoted by me/us.

33) Thus, the rates were quoted by the Appellant after inspection of the site and after familiarizing all contractual features such as accessibility, working condition, geological feasibility/terrain conditions. We therefore do not find any element of perversity or manifest illegality in the findings recorded by the learned Single Judge while setting aside the Award *qua* Claim No.8.

34) Faced with the difficulty that Claim Nos.5, 6 and 8 were awarded by the Arbitral Tribunal in ignorance of correspondence between the parties and contractual clauses, Mr. Joshi has sought to salvage the situation by contending that the Arbitral Tribunal was not a Court and was expected to record adequate or sufficient reasons for making the Award. He would submit that all the three claims awarded by the Arbitral Tribunal are genuine claims as the Appellant

has actually incurred additional expenses towards excavation of soft strata, as well as payment of higher amount of wages to the labour on account of increase in the rates of minimum wages and excavation. It is therefore suggested on behalf of the Appellant that the Award could not have been set aside so long as the ultimate conclusions reached by the Arbitral Tribunal are found to be correct. Reliance is placed on judgment of the Apex Court in ***OPG Power Generation Private Limited*** (supra) in which it is held in para-168 as under :-

> **168.** We have given due consideration to the above submission. In our view, a distinction would have to be drawn between an arbitral award where reasons are either lacking/unintelligible or perverse and an arbitral award where reasons are there but appear inadequate or insufficient [See paras 79 to 83 of this judgment.] . In a case where reasons appear insufficient or inadequate, if, on a careful reading of the entire award, coupled with documents recited/relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/intelligible, and the same exhibits no perversity, the Court need not set aside the award while exercising powers under Section 34 or Section 37 of the 1996 Act, rather it may explain the existence of that underlying reason while dealing with a challenge laid to the award. In doing so, the Court does not supplant the reasons of the Arbitral Tribunal but only explains it for a better and clearer understanding of the award.

35) This is not a case where the reasons are inadequate or insufficient. The case involves an element of perversity in the findings recorded by the Arbitral Tribunal since the relevant material is not taken into consideration. It is well settled position of law that where vital evidence is ignored in arriving at a decision that the same is rendered perverse [*See* ***Associate Builders*** (supra)]. Thus, the observations of the Apex Court in para-168 of the judgment in ***OPG Power Generation Private Limited*** would not come to the assistance of the Appellant. According to us, the Appellant is not entitled to any amount under Claim Nos. 5, 6 and 8 and the case does not involve a situation where the ultimate conclusion/direction of the

arbitrator is valid but reasons are not adequate, sufficient or intelligible.

36) After considering the overall conspectus of the case we do not find any valid ground to interfere in the order passed by the learned Single Judge setting aside the Award of the Arbitral Tribunal qua Claim Nos.5, 6 and 8 in exercise of powers under Section 34 of the Act. The learned Single Judge has acted within the contours of jurisdiction under Section 34 of the Act. Therefore, there is no warrant for interference by the Appeal Court under Section 37 of the Act. The Order passed by the learned Single Judge is unexceptional. The Appeal is accordingly **dismissed.**

[SANDEEP V. MARNE, J.] **[CHIEF JUSTICE]**

NEETA SHAILESH SAWANT

Digitally signed by NEETA SHAILESH SAWANT
Date: 2025.07.22 15:49:04 +0530